NO. 83-6430

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JAMES DUPREE HENRY,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT.

JIM SMITH
ATTORNEY GENERAL

EVELYN D. GOLDEN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl 32014
(904) 252-1067

QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS AND THIS COURT'S DECISION IN ENMUND v. FLORIDA, PERMITS THE EXECUTION OF MR. HENRY'S SENTENCE OF DEATH WHERE THE JURY COULD HAVE FOUND FROM THE EVIDENCE A PREMEDITATED INTENT TO KILL.

II.

WHETHER THE DEATH SENTENCE IMPOSED UPON HENRY WAS BASED ON UNRELIABLE AND ARBITRARY FACTORS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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JURISDICTION

Jurisdiction of this Court is sought pursuant to 28 U.S. C. Section 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Eighth and Fourteenth Amendments to the United States Constitution. Additionally, Sections 921.141 and 782.04, Florida Statutes (1973) are involved and are reproduced and attached hereto in the Appendix at (RA-1).*

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*Page references to the appendix to this brief in opposition to Petitioner's Petition for Writ of Certiorari is cited as "RA-."

STATEMENT OF THE CASE

A. History of the Case.

Petitioner was convicted and sentenced to death for the crime of first degree murder on June 26, 1974. The Florida Supreme Court affirmed both conviction and sentence. Henry v. State, 328 So.2d 430 (Fla. 1976). This Court denied a Petition for Writ of Certiorari on November 8, 1976. 429 U.S. 951. Rehearing was denied February 22, 1977. 429 U. S. 1124.

Pursuant to Gardner v. Florida, 430 U.S. 349 (1977), Petitioner filed an application for relief in the Florida Supreme Court on or about August 8, 1977. This was denied by order of that court dated January 30, 1978, and rehearing was denied by order dated December 5, 1978. On or about May 7, 1979, Petitioner filed a second Petition for Writ of Certiorari in this Court which was denied by order dated October 1, 1979. Rehearing was denied on October 29, 1979.

On November 2, 1979, Petitic ıer filed a Motion for Post-Conviction Relief in the Circuit Court, in and for Orange County, Florida. A hearing was held on November 16, 1979, following which the trial judge entered a order denying the Motion for Post-Conviction Relief. On appeal, the Florida Supreme Court affirmed the order of the state court trial judge denying Post-Conviction Relief. Henry v. State, 377 So.2d 692 (Fla. 1979).

On November 27, 1979, Petitoner filed a Petition for Writ of Habeas Corpus in the Federal District Court. Following a hearing which began on November 30, 1979, and thereafter completed on January 11, 1980, the District Court entered its order granting the Petition for Writ of Habeas Corpus on February 14, 1980. Respondent's Petition for Rehearing was denied by order dated February 25, 1980.

On appeal, the Eleventh Circuit Court of Appeals

(former Fifth Circuit Case) affirmed the order of the District Court granting the Petition for Writ of Habeas Corpus. A petition for rehearing and suggestion for rehearing en banc were denied on January 26, 1982. By order dated February 3, 1982, the lower court stayed its mandate to and including February 25, 1982, which was continued by order entered by Mr. Justice Powell on February 23, 1982, pending the timely filing and disposition of Respondent's Petition for Writ of Certiorari. The Petition for Writ of Certiorari was granted by this Court, and the judgment was vacated and the case was remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Engle v. Isaac, 456 U.S. 102 S.Ct. 1558, 71 L.Ed. 2d 783 (1982). Wainwright v. Henry, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed. 2d 1326 (1982).

On remand, the Eleventh Circuit found that Engle v. Isaac, did not lead to a different result in this case, and reinstated that prior judgment. Henry v. Wainwright, 686 F.2d 311 (5th Cir. Unit B 1982). A Petition for Writ of Certiorari was filed by Respondent, Louie L. Wainwright, which this Court granted vacating the judgment of the Court of Appeals of the Fifth Circuit, and remanding the case to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Barclay v. Florida, 463 U.S. ____, 103 S.Ct. 3418, 76 L.Ed. 2d(1983). Wainwright v. Henry, ____U.S.____, 103 S.Ct. 3566, 76 L.Ed. 2d ____(1983).

Upon reconsideration, the Court of Appeals, Fifth Circuit, determined that the decision in Barclay demonstrates that their previous decision was in error. After considering the issues raised by Henry on cross-appeal not passed on in their previous decisions, the court concluded that the district court properly denied relief as to those issues. Therefore, the court affirmed the judgment of the district court denying the writ as to the additional issues and

reversed the judgment of the district court granting relief on the Barclay issue. Henry v. Wainwright, 721 F.2d 990 (5th Cir. Unit B 1983).

B. Statement of the Facts

The facts as found by the Florida Supreme Court (328 So.2d 430) are as follows:

Appellant was indicted for murder in the first degree in that he did with premeditated design kill and murder Z. L. Riley by suffocating him with a gag, and was found guilty. The majority of the jury recommended that the death penalty be imposed and the trial judge, having considered the mitigating and aggravating circumstances, sentenced appellant to death.

The victim was found in the bedroom of his home bound and gagged with his throat cut. Two double edge razor blades were lying near his body covered with dried blood. The pockets of the deceased's pants were turned inside out, but no wallet, money, personal effects were found. Appellant's thumb print was found in the victim's bedroom. In performing an autopsy on the body of the deceased, Doctor Hegert found extensive head and facial wounds, including two fractures of the jaw and mild to moderate brain hemorrhaging caused by "blunt force," cuts on the hands, two deep cuts four and five inches long and several more cuts above the neck consistent with use of a razor blade. The doctor determined that the actual cause of death was a gag placed tightly under the tongue of the deceased so as to force the tongue back into the throat, cutting off the airway and suffocating the victim.

At the time of the murder, the appellant lived next door to the victim. When Officer Ferguson went to arrest appellant at his residence, several days after the murder appellant jumped Ferguson, took his gun,

shot Ferguson twice and then fled. He was found an hour later hiding behind a dryer machine, arrested, taken to the Orlando Police Station and advised of his rights. Before interrogation, he was fully advised of his rights, he signed a waiver card, and he advised the officers that he would talk to them. During the course of this interrogation, he confesses that he had killed the deceased, and gave the officers full details of the murder. The officers present testified that no promises or threats were made, and that appellant was not offered any hope of leniency or other reward to induce his statement.

Four days before the trial, he filed a motion to suppress his confession. Before trial, the trial judge conducted a lengthy hearing on the voluntariness of the confession, after which the trial judge denied the motion to suppress. At the conclusion of the State's case, defense counsel moved for a directed verdict of acquittal which was denied. Relying solely upon the defense of insufficient evidence, appellant did not testify nor call other witnesses. After deliberation for one hour, the jury returned a verdict of guilty. The sentence advisory hearing was then conducted, after which, the jury returned a recommendation of the death penalty. Id. at 430, 431.

REASONS FOR NOT GRANTING THE WRIT.

I.

THAT THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THIS COURT'S DECISION IN ENMUND v. FLORIDA, PERMITS THE EXECUTION OF MR. HENRY'S SENTENCE OF DEATH WHERE THE JURY COULD HAVE FOUND FROM THE EVIDENCE, A PREMEDITATED INTENT TO KILL.

Contrary to Mr. Henry's assertions, Mr. Riley's death was not accidental. Petitioner insults this Court's intelligence in maintaining that the bounding and gagging of Mr. Riley in such a manner as to force his tongue back

into his throat, cutting off the airway and suffocating him, was accidental and unintended.

Contrary to Petitioner's assertion, the question is not whether a death sentence may be imposed consistent with the Eighth and Fourteenth Amendment for an offense involving an accidental death where no lethal force was employed or intended; but whether a death sentence may be imposed consistent with the Eighth and Fourteenth Amendments for an offense where the evidence clearly indicated a premeditated intent to kill for pecuniary gain. Petitioner Henry, relying principally on Enmund v. Florida, _____U.S. _____102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982) contends that the death sentence in his case is disproportionate and excessive because it is based on felony murder without a specific finding of intent to kill. Although Enmund did hold that the death sentence could not be imposed when no intent is shown and the killing occurs during the perpetratation of a felony, that case is readily distinguishable from the instant case. Enmund was waiting in the getaway car during a planned robbery when one or both of his two co-felons shot and killed two victims who resisted the robbery. This Court held that the death penalty was disproportionate to Enmund's culpability reasoning that he personally "did not kill or attempt to kill" or have "any intention of participating in or facilitating a murder." ____U.S. _____102 S.Ct. at 3377, 73 L.Ed. 2d 1152. However, here Henry personally killed his victim, bounding and gagging him in such a manner that the tongue of the deceased was forced back into the throat, cutting off the airway and suffocating the victim. Henry acted alone. He is fully culpable for the murder. Under these circumstances, the death penalty is not "grossly disproportionate." Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed. 2d 982 (1977) (plurality opinion).

Henry additionally maintains that Florida has

impermissibly made the death penalty the "automatically preferred sentence" in any felony murder case because one of the statutory aggravating factors is the murder taking place during the course of a felony. Respondent would maintain that this Court has upheld the Florida Death Penalty Statute, including and necessarily the use of this statutory aggravating factor. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976). Florida does not mandate the death penalty in all felony murder cases. Additionally, the defendant is not precluded under the Florida Law from presenting any mitigating factors that might outweigh the aggravating factor of the murder taking place during the course of a felony.

Enmund's Petition for Certiorari presented this Court with the question of whether death is a valid penalty under the Eighth and Fourteenth Amendments "for one who neither took life, attempted to take life, nor intended to take life." Id. at ___U.S. ____102 S.Ct. 3371. This Court concluded that imposition of the death penalty in these circumstances was inconsistent with the Eighth and Fourteenth Amendment.

Unlike Enmund, the Petitioner herein acted alone. He is fully culpable for the murder. Unlike Enmund, Henry personally, without co-perpetrators,robbed the victim, bound and gagged him in such a manner in which his tongue was pushed back into his throat cutting off the airway and suffocating him. Henry claims that he did not intend for the victim to die, nevertheless he did perform the fatal act with intent to seriously and wantonly harm the victim. Petitioner had no accomplice, therefore Enmund is inapplicable and is not a bar to the execution of Henry's death sentence.

In the Petitioner's first Petition for Writ of Certiorari to the Supreme Court of Florida, Petitioner raised the yery issue that is now before this Court.

The Court denied that first Petition for Writ of Certiorari to the Supreme Court of Florida, and it should accordingly deny the instant Petition for Writ of Certiorari raising the very same grounds as those alleged in the first petition. Cert. denied 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed. 2d 319 (1976) reh. denied 429 U.S. 1124, 97 S.Ct. 1164 (1977).

II.

THE DEATH SENTENCE IMPOSED UPON HENRY IS NOT BASED UPON UNRELIABLE AND ARBITRARY FACTORS: AND DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner alleges that his death sentence rests solely on a nonstatutory aggravating factor. Petitioner further maintains that his capital sentencing proceedings lacked the one procedural safeguard deemed constitutionally indispensable by the court; a finding of at least one statutory aggravating circumstance. Clearly, Petitioner has overlooked the trial court's finding that the act herein was for pecuniary gain and for no other motive other than perhaps to eliminate the witness. See Henry v. State, 328 So.2d 431. Petitioner further appears to have further overlooked the district court's finding that the evidence of the aggravating circumstances (murder while committing robbery, especially heinous, atrocious and cruel murder, and pecuniary gain) was overwhelming. 721 F.2d at 995.

Upon consideration of this Court's decision in Barclay, the Fifth Circuit stated that:

> In Barclay, however, Justice Stevens referred to a "death sentence" resting "solely on a nonstatutory . . .factor," Id.; he did not directly address whether the jury as well as the judge must specifically find a statutory aggravating factor to be present. In Florida, the judge is the sentencing authority, and the jury acts only in an advisory capacity, returning a general

> verdict recommending life or death. Both the judge and jury heard substantial evidence of statutory aggravating factors in this case, and the judge specifically found statutory aggravating factors to be present. This procedure provides us adequate assurance that Henry's sentence does not rest solely on a nonstatutory factor.

721 F.2d at 994.

A. The jury was not permitted to base its verdict of death solely on a non-statutory aggravating factor.

In this case, the nonstatutory aggravating circumstance relied on by the judge was Henry's resisting arrest and shooting a police officer as the officer knelt on the ground begging not to be shot again. Henry's actions clearly have a material bearing on the character of the defendant, and his actions were not constitutionally protected conduct. Under Barclay, this was enough to render the evidence constitutionally "admissible". In Barclay, this Court stated that "the constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime." Id. 103 S.Ct. at 3433 (Stevens, J., concurring).

Although it is impossible to determine what evidence the jury relied upon in reaching its advisory sentence of death, it is clear that the judge specifically found statutory aggravating factors to be present, and sentenced him accordingly. Justice Stevens' concurring opinion did not directly address whether the jury as well as the judge must specifically find a statutory aggravating factor to be present. Id.

B. The Court of appeals did not misapprehend the advisory role of the jury during the penalty phase of a capital case.

The court of appeals correctly recognized that it is the judge and not the jury that is the sentencer in Florida. In Barclay, this Court reviewed the statute at issue which the court upheld in Proffitt v. Florida, supra, stating that:

> "[I]f a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument. . .
>
> "At the conclusion of the hearing the jury is directed to consider '[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and. . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.' §§ 921.141(2)(b) and (c) (Supp. 1976-1977). The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge.

Id. 103 S.Ct. 3425.

The Florida statute has not changed since Proffitt. The jury's verdict is still only advisory.

C. The jury in Henry's case was constitutionally instructed.

Petitioner erroneously contends that the jury's discretion was not confined because the jury was not required to find a statutory aggravating circumstance before reaching its death verdict.

Florida's statute requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances and does not permit non-statutory aggravating

circumstances to enter into this weighing process. E.g., Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978).

The jury is not the "sentencer" in Florida. The jury verdict is still only advisory. The discretion Petitioner suggests should lie in the jury, in Florida, abounds only in the trial judge. It is the trial judge who is directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed upon a defendant. The statute requires the judge and not the jury to set forth in writing its findings upon which the sentence of death is based. § 921.141(3) Fla. Stat.

Petitioner further maintains that the sentencing proceeding was open ended in that the prosecutor was allowed to present any evidence in aggravation without limitation. Respondent does not agree with Petitioner's characterization of the evidence presented by the prosecutor. Nevertheless, in prior decisions this Court has not seen any constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances. California v. Ramos, ___U.S.____103 U.S. Ct. 3446, 3456, 75 L.Ed. 2d_____ (1983). See also, Zant v. Stephens, ____U.S. ___, 103 S.Ct. 2733, 2743-2744, 75 L.Ed. 2d____(1983); and Proffitt v. Florida, n.8, supra. 428 U.S. at 256, 96 S.Ct. at 2968.

Petitioner further contends that the sentencing proceeding was open ended because the jury was permitted to base a death verdict on anything or any evidence at all. Under Florida law, evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. The testimony regarding the shooting of Officer Ferguson as he knelt on the ground begging not to be shot again, was clearly relevant to Henry's character. Henry's

actions (shooting a police officer to avoid arrest) was not constitutionally protected conduct. See Henry v. Wainwright, 721 F.2d at 994; Barclay, 103 S.Ct. at 3433 (Stevens, J., concurring).

Petitioner further contends that the sentencing proceeding was open-ended because the jury was not told that the state bore the burden of proving aggravating factors or that aggravating circumstances were required to be proven beyond a reasonable doubt. Respondent would point out that the jury never heard any instruction during the trial on any standard of proof other than beyond a reasonable doubt. Trial counsel for Petitioner never requested the trial judge to give such a charge.

Although a capital trial is a bifurcated one, it is still one trial. In the guilt/innocence stage, the trial judge emphasized twenty-two times that the burden of proof the prosecution must meet was beyond a reasonable doubt. The jury was never instructed as to any other standard of proof. Id. 721 F.2d at 995.

Petitioner further alleges that the sentencing proceeding was open-ended because the aggravating factors were not defined for the jury, but simply listed from the statute; and that the jury was allowed to base its verdict solely upon nonstatutory aggravating factors. Neither this Court or any other court has required a trial judge to be clairvoyant with respect to predicting what the law will be in the future. At the time of Petitioner's trial, the use of nonstatutory aggravating circumstances was permitted under the law in effect at the time Petitioner was tried. Subsequent to Petitioner's trial, the Florida Supreme Court construed § 921.141(5) Florida Statutes as providing an excluvise list of aggravating factors. Purdy v. State, 343 So.2d 4,6 (Fla.) cert. denied, 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed. 2d 114 (1977).

The Florida Supreme Court has held that consideration of nonstatutory aggravating circumstances is harmless error where there are other statutory aggravating factors and no mitigating factors. See Brown v. State, 381 So.2d 690 (Fla. 1980); Douglas v. State, 373 So.2d 895 (Fla. 1979); Elledge v. State, 346 So.2d 998 (Fla. 1977). Petitioner's argument that the jury verdict was based solely upon nonstatutory aggravating factors is simply not true. The trial judge found that the murder was committed for pecuniary gain and to eliminate a witness. The federal district court found the evidence to be overwhelming as to the aggravating circumstances (murder while commiting a robbery, especially heinous and cruel murder, and pecuniary gain).

Additionally, Petitioner's argument that the sentencing proceeding was open-ended because the aggravating factors were not defined for the jury, is not preserved for review by this Court. Petitioner never raised this issue in the trial court or in his direct appeal to the Florida Supreme Court (See copy of Brief of Appellant on direct appeal attached hereto as RA 2), or any other court of competent jurisdiction. Therefore, review by this Court is precluded. Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969); Cardinale v. Louisiana, 394 U.S. 437, 438 89 S.Ct. 1161 (1969) and Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981).

CONCLUSION

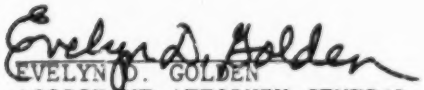
Petitioner's sentencing hearing was not unreliable or arbitrary. The sentencing authority clearly has discretion in deciding whether to impose the death penalty. See Barclay, 103 S.Ct. at 3431 (Stevens, J., concurring). It is not unconstitutional for the State of Florida, in constructing a death sentencing procedure, to consider murders committed in the course of other dangerous

felonies to be reprehensible. This court has held the Florida statute constitutional. See Proffitt v. Florida.

The decision of the court of appeals on remand properly applied this Court's decision in Barclay to the instant case as required by this Court's decision in Wainwright v. Henry, ____U.S.____, 103 S.Ct. 3566, (1983). Accordingly, the Petition for Writ of Certiorari, should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



EVELYN D. GOLDEN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

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RESPONDENT'S APPENDIX

JIM SMITH
ATTORNEY GENERAL

EVELYN D. GOLDEN
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl 32014
(904) 252-1067

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CHAPTER 782

HOMICIDE

782.01 Homicide generally.—The killing of a human being is either justifiable or excusable homicide, or murder or manslaughter, according to the facts and circumstances of each case.

History.—§1, sub-ch. 3, ch. 1637, 1868; RS 2877; GS 3202; RGS 5032; CGL 7134.

782.02 Justifiable homicide.—

(1) Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either in obedience to any judgment of a competent court, or when necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty, or when necessarily committed in retaking felons who may have been rescued or who have escaped, or when necessarily committed in arresting felons fleeing from justice.

(2) Homicide is justifiable when committed by any person in either of the following cases:

(a) When resisting any attempt to murder such person, or to commit any felony upon him, or upon or in any dwelling house in which such person shall be; or

(b) When committed in the lawful defense of such person of his or her husband, wife, parent, grandparent, mother-in-law, son-in-law, daughter-in-law, father-in-law, child, grandchild, sister, brother, uncle, aunt, niece, nephew, guardian, ward, master, mistress or servant, when there shall be a reasonable ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished; or

(c) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

History.—§14, 3, sub-ch. 3, ch. 1637, 1868; RS 2878; ch. 4957, 1901; §1, ch. 6964, 1901; GS 3203; RGS 5033; CGL 7135.

782.03 Excusable homicide.—Homicide is excusable when committed by accident and misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

History.—§6, sub-ch. 3, ch. 1637, 1868; RS 2879; GS 3204; RGS 5034; CGL 7136.

782.04 Murder.—

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

History.—§2, sub-ch. 3, ch. 1637, 1868; RS 2880; GS 3205; RGS 5035; §1, ch. 8470, 1921; CGL 7137; §1, ch. 29023, 1953; §712, ch. 71-136, §3, ch. 72-724.
cf.—Ch. 801 Child molester law.

782.05 Killing in duel.—Killing by fight in single combat, commonly called a duel, with deadly weapons, shall be murder in the first

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CHAPTER 921
SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—§353, ch. 19584, 1939; COL 1940 Supp. 8663(364); §121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—§358, ch. 19584, 1939; COL 1940 Supp. 8663(367); §122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within [illegible]

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days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—§237a, ch. 19684, 1939; CGL 1940 Supp. 8863(248); §119, ch. 70-339; §1, ch. 72-72; §9, ch. 72-724.

*Note.—Bracketed word inserted by the editors.

Note.—See former §919.23.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in ninety days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of ninety days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—1269s, ch. 19684, 1939; CGL 8438, 8437; CGL 1940 Supp. 8863(279); §123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—1261, ch. 19684, 1939; CGL 1940 Supp. 8863(271); §124, ch. 70-339.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the division of corrections of the department of health and rehabilitative services shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the division of corrections. When delivering a prisoner to the division of corrections the sheriff shall certify in writing to the division:

(a) The date the sentence was imposed and the date the prisoner was delivered to the division.

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—§1, ch. 63-457; §§19, 20, ch. 69-106; §120, ch. 70-339; §1, ch. 70-441; §1, ch. 73-71.

RA-1

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES DUPREE HENRY,	)	
	)	
Appellant,	)	
v.	)	CASE NO.
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

1-3-75

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ATTORNEY GENERALS OFFICE

BRIEF OF APPELLANT

On Appeal From the Circuit Court of the 9th Judicial Circuit of Florida, In and For Orange County (Criminal Division.)

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
319 Clematis Street
West Palm Beach, Florida 33401
(305) 659-4777

RICHARD LUBIN
Assistant Public Defender

MARTIN H. COLIN
Assistant Public Defender

Counsel For Appellant.

RA-2

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Ninth Judicial Circuit of Florida, In and For Orange County. In the Brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will refer to the Record-On-Appeal, the symbol "SR" will signify Supplemental Record-On-Appeal; the symbol "T" will refer to the Transcript of the Trial Proceedings, and the symbol "S" will signify the Transcript of the Motion to Suppress Proceedings.

STATEMENT OF THE CASE

On April 1, 1974, an Indictment was filed charging Appellant with First Degree Murder (R 1).

On June 20, 1974, Appellant filed a Motion to Suppress a Confession claimed to be involuntarily obtained (R 47). On June 24, 1974, a hearing was held at which the motion to suppress was denied (S 107).

Appellant was tried by jury on June 24, 1974 through June 26, 1974. During the trial, Appellant's confession was admitted into evidence over objection (T 244 - 255). In addition, an extremely gruesome photograph of the deceased was admitted into evidence over Appellant's objection (T 214 - 215). During the charging of the jury, the trial court refused to instruct the jury as requested by Appellant with regard to Second Degree Murder (T 314, 315). Instead, the trial court gave an erroneous instruction with regard to Second Degree Murder over Appellant's objection (T 364, 367).

At the close of the State's case, Appellant moved for a judgment of acquittal (T 304 - 306), which was denied (T 306). Appellant renewed his Motion for Judgment of Acquittal at the close of all the evidence (T 313) which was again denied (T 313).

The jury returned a verdict of Guilty as Charged (R 83). A Sentence Advisory Hearing was held on the same day (R 48 - 50). The jury recommended that the Court impose the death on the Appellant by a vote of seven out of twelve (R 51).

The trial court adjudged Appellant Guilty of First Degree Murder and sentenced him to Death (R 56 - 57).

Appellant filed a Motion for New Trial (R 98-99) which was denied (R 100).

On July 11, 1974, the trial court published his findings in support of his imposition of a death sentence upon Appellant (R 101 - 102).

Notice of Appeal was filed July 15, 1974 (R 118).

STATEMENT OF THE FACTS

The first two witnesses to take the stand for the State were Mr. and Mrs. Dennis Turnage (T 102). Mr. Turnage was the great nephew of one Z. L. Riley (T 102). They testified that they drove Mr. Riley to the latter's home on 426 Sunset Drive in Orlando on March 23, 1974 at 5:00 p.m. (T 103, 116). On the next day, the witnesses arrived at approximately 8:00 a.m. at Mr. Riley's home in order to visit him (T 104, 116). When Mr. Riley did not appear from the home to greet them, as expected, the witnesses entered the home, saw it ransacked and observed Mr. Riley in his bedroom lying on the bed dead (T 105, 106, 117). They did not, however, see Appellant in the vicinity of Mr. Riley's home (T 115, 119).

The third State witness to testify was Officer Chester Hawkins of the Orlando Police Department. He stated that he arrived at Mr. Riley's home at 7:50 a.m. on March 24, 1974, and entered the bedroom in which he found Mr. Riley bound, gagged and cut around the throat (T 122, 123).

Next to testify for the State were Larry Hines and Wilbert Hughes, who were neighbors of Mr. Riley (T 130, 138). They stated that they knew Appellant, James Dupree Henry, and that they saw him in the vicinity of their homes on the evening of March 23, 1974 (T 131, 139). In addition, it was revealed that Appellant had asked Mr. Hines to borrow money on that evening which he could not do because of lack of funds (T 132).

Officer Lane C. Lauderback testified next and stated that after he arrived at the murder scene in the afternoon of March 24, 1974, he observed Appellant in the vicinity of the Riley home (T 163). He further stated that he received from another officer, R. A. King, tennis shoes

found near the murder victim's home which Appellant admitted belonged to him (T 164, 165).

The ninth State witness was identification technician Calvin M. Gardner. He testified that he found a latent fingerprint on a cigar box which was found in the murder victim's home (T 170, 173).

The tenth witness was Officer Ronald Page. He was a fingerprint examiner and testified that he made a comparison between the latent fingerprint found by technician Gardner and an inked fingerprint taken from Appellant on March 28, 1974, and concluded that they were the same (T 183 - 189).

The next witness to testify was Dr. Thomas Hegert. He stated that he examined the victim at 12:30 p.m. on March 24, 1974 and pronounced him dead (T 208). During his testimony, a gruesome photograph of the victim was admitted into evidence over objection (T 212 - 215).

The twelfth witness to take the witness stand was Officer John C. Mathews who testified that he arrested Appellant on March 28, 1974 in a local Orlando washroom and took him to the police station (T 231 - 233).

Detective R. D. King testified next and stated that he interviewed Appellant extensively on March 28, 1974 between 1:30 p.m. and 4:00 p.m. in the Orlando Police Department interrogation room (T 236 - 237). A confession was obtained by King from Appellant in which Appellant admitted killing Mr. Riley. Over objection, the confession was read to the jury in an inflammatory manner (T 243 - 255).

The fourteenth State witness was Officer Lawrence A. Frazier. He testified that he found a credit card belonging to Mr. Riley in a

drain pipe in Orlando on April 21, 1974 (T 278 - 279).

The final State witness was Officer Arnold E. Ferguson. He testified that on March 28, 1974, he saw Appellant, identified himself, and told Appellant that he was under arrest for first degree murder (T 296 - 298). He further testified that in attempting to place Appellant under arrest, a struggle ensued in which Appellant seized the witness's gun and shot him (T 301 - 303).

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE, OVER APPELLANT'S TIMELY OBJECTION, A CONFESSION MADE BY HIM TO THE POLICE WITHOUT FIRST MAKING AN EXPLICIT AND UNEQUIVOCAL FINDING THAT SAID CONFESSION HAD BEEN VOLUNTARILY MADE.

(Raised by Assignment of Error No. 3.)

In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the United States Supreme Court held that the Fourteenth Amendment of the United States Constitutionrequires the trial judge to make an initial determination, out of the hearing of the jury, that a confession or statement made by an accused was voluntarily given before he allows it to be considered by the jury. In Florida jurisdictions, the State has the burden of proof to show by preponderance of the evidence that the statement was voluntarily obtained. Johnson v. State, 294 (No. 9) So.2d 69 (Fla.1974).

The result of such determination must appear from the record with unmistakable clarity. Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967). Florida courts have followed these decisions. McDole v. State, 283 So.2d 553 (Fla.1973); Danahey v. State, (4 DCA 1974), Case No. 73-1230, (Opinion filed August 2, 1974); Smith v. State, 288 So.2d 523 (3 DCA 1974).

In Sims v. Georgia, supra, at 385 U.S. 540, 541, Appellant filed a pre-trial motion to suppress a confession claimed to have been coerced by Georgia State policemen and a State medical examiner during a post-arrest interrogation. At the motion hearing, Appellant asserted that he was mistreated by the doctor and police and was suffering from such abuse

when he gave the confession. The doctor denied abusing Appellant. Id. at 542.

The trial court denied the Motion to Suppress and the confession was admitted into evidence at Appellant's trial. Id. at 541. In addition, there was no actual ruling or finding in the record showing that the trial judge determined the voluntariness of the confession Id. The United States Supreme Court reversed Petioner's conviction for rape stating:

> "A constitutional rule was laid down in that case (Jackson v. Denno, supra), that a jury is not to hear a confession when and until the trial judge has determined that it was freely and voluntarily given . . . Although the judge need not make formal findings a fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity. Here there has been absolutely no ruling on that issue and it is therefore impossible to know whether the judge thought the confession voluntary or if the jury considered it as such in its determination of guilt. Such rule is, as we have said, a constitutional rule binding on the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed." Id. at 543, 544 (Emphasis supplied).

In McDole v. State, supra, the Florida Supreme Court adopted the Sims mandate. In that case, the defendants made a motion to suppress the confession made by them on the grounds that they were not voluntarily given. Id. 283 So.2d at 553. The Motion to Suppress was denied by the trial court with the judge stating, "The motion will be denied" and that each side could present the same evidence on the issue of voluntariness to the jury "so that they can give what weight they consider appropriate to this alleged confession." Id. The Supreme Court of Florida, in re-

versing defendant's conviction, held that the trial judge's statement was not an unequivocal and explicit finding of voluntariness as required by Jackson v. Denno, supra, and Sims v. Georgia, supra. The Court further declared that the purpose of requiring the trial court to make a specific finding on the record that the statement or confession was voluntarily given was:

> "Without a specific finding, we do not know if the judge properly based his ruling of admissibility on the issue of voluntariness, and we cannot infer a specific finding of voluntariness simply from a specific denial of the motion to suppress. The judge might have based his denial of the motion on the idea that any error in admitting the confession would be harmless, or he might have felt that the primary determination of voluntariness should have been left with the jury. . . The judge might have been referring to the fact that a jury may still find a confession to have been involuntary and disregard it, despite a judge's finding that it was voluntary. (Citation omitted.)" Id. 283 So.2d at 554.

In Danahey v. State, supra, at the close of the hearing on defendant's motion to suppress, the trial judge stated:

> "I am going to deny that motion. The jury will be able to put what weight they want on this." Id.

In that case, the Fourth District Court of Appeal held that the language used by the trial judge did not constitute an express finding of voluntariness and reversed the defendant's conviction and remanded for a new trial. Id.

It is now a well established rule in Florida that the failure of the trial judge to make a proper determination of voluntariness is

reversible error requiring an unqualified new trial. Land v. State, 293 So.2d 704 (Fla.1974); Danahey v. State, supra; Smith v. State, 288 So.2d 523 (3 DCA 1974).

Appellant would submit that the trial court sub judice did not follow the above specific procedures required as a constitutional prerequisite to the admission into evidence of statements given police which are claimed to be involuntary.

In the case at bar, Appellant filed a pre-trial "Motion to Suppress Confession" pursuant to Rule 3.190(i), F.R.Cr.P., requesting that the trial court suppress as evidence "any written or oral statements made by defendant to the police" . . . on the grounds that, inter alia, the statements were made involuntarily in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution (R 47).

On June 24, 1974, a hearing on the motion to suppress was held before Honorable Peter M. de Manio, Circuit Judge. Three witnesses testified for the State and four witnesses testified for the defense, including the Appellant.

The first State witness, Officer John Mathews of the Orlando Police Department, testified that on March 28, 1974, he apprehended Appellant in a local washroom and took him at approximately 12:15 p.m. to the Orlando police station (S 7-8). At the police station, Appellant was advised of his Miranda warnings and stated that no threats or promises had been made in order to procure a statement from him at that time (S 9-10). Appellant did not, however, give Officer Mathews any statement (S 11).

The second State witness to testify was investigative officer Charles R. Ings (S 15). He stated that at approximately 1:30 p.m. on March 28, 1974, he commenced an interrogation of Appellant in the interview room at the Orlando police station concerning the shooting of an Orlando policeman, one Ronald Ferguson (S 15 - 16) (S 20). At this time Appellant was also informed that he was under investigation for the murder of one Z. L. Riley (S 17, 18, 20). Present during the interrogation was another investigator, one R. D. King (S 21).

During cross-examination, it was revealed that the interview room was approximately four feet long by four feet wide and contained a table and four chairs but had no windows (S 21). Appellant was handcuffed to one of the chairs during the interrogation (S 21).

Officer Ings testified that after advising Appellant of his Miranda warnings, he questioned Appellant about his background, prison record, why he was a murder suspect and then reminded Appellant that Investigator King had found his fingerprints inside the murder victim's home (S 23 - 24). A prayer session was conducted between Appellant and Investigator King, asking that Appellant have the strength to tell the truth if he was involved in the murder (S 25, 28).

The witness further testified that Appellant broke down and wept during the prayer session (S 28). Appellant stated that he was inside the Riley home on the day that it was ransacked. In this regard, Officer Ings told Appellant that only the person who committed the crime would know what the crime scene looked like (S 25). After two and one half hours of similar questioning, and at approximately 4:0[illegible] p.m., Investigator King asked Appellant to tell him what happened in the Riley

home (S 26). At this time Appellant confessed to killing Riley, the confession being recorded on a tape player (S 29, 30).

Prior to giving the confession, Appellant was told by Officer Ings that it would go easier on him if he talked and that a report would be filed with the State Attorney's Office noting his cooperation (S 19, 32).

The final State witness was Investigator R. D. King (S 36). His testimony related substantially the same facts and events as revealed by Officer Ings. He stated that he told Appellant that his fingerprints positively identified him as being inside the murder victim's home (S 47), that Z. L. Riley was a leading man in the black community (S 50) and that praying and discussing religion would help him (S 511).

The witness further testified that in his opinion, telling Appellant that a report of his cooperation would be made part of the police report which would be given to the State Attorney was not a promise of reward or leniency (S 54).

After the State rested (S 60), the defense presented evidence in form of the Motion to Suppress. The key witness was the Appellant himself, James Dupree Henry (S 76). He testified that at approximately 12:30 p.m., on March 28, 1974, he was taken into custody and brought to the Orlando police department under physical restraint (S 77).

After he was booked and fingerprinted, Appellant was taken to the interrogation room in which Officer Ings and Investigator King were present (S 79, 80). During the interrogation, King told Appellant that there was evidence that he had killed Z. L. Riley and Ings informed Appellant that it would be easier for him to state what happened on the night of the murder (S 82). In addition, King played a tough-guy role during the questioning,

while Ings displayed a friendly attitude in hope of inducing Appellant to make a statement (S 83).

Appellant further testified that during the interrogation, at a time when King requested that Appellant make a statement, Appellant asked to see a lawyer, to which the officers made no verbal response (S 83-84).

Appellant described the prayer session with Ings as highly emotional (S 84-86). He testified that as a result of the prayer session, the aggressiveness of the officers toward him, and the fear of being handcuffed in a room with two officers made him feel that it would be best for him to make a confession (S 87). In addition, Appellant stated that Ings told him that if he cooperated, things would be "lighter" on him (S 88).

At the close of the presentation of the evidence, Appellant's defense counsel argued extensively that the confession was obtained involuntarily and should be suppressed (S 96-100, 106-107). In particular, defense counsel contended that in view of the two and one-half hour interrogation period in a small room in which the Appellant was alone with the two officers; the highly emotional prayer session; the harsh approach to questioning by one officer as opposed to a friendly attitude displayed by the other; the physical restraints which Appellant was under and the implied promises of reward or leniency conveyed to Appellant by the officers' statement that a report of cooperation would be made to the State Attorney, created an atmosphere which coerced Appellant into making the confession in question (S 97-100, 106-107).

The State disagreed, contending that the confession was not induced by promises of reward or leniency and that the confession was not obtained involuntarily (S 101-106).

At the conclusion of the arguments, the trial court stated:

> THE COURT: The Motion to Suppress will be denied. I would like to pick a jury this evening (S 107).

During the trial Appellant's confession was read to the jury over objection (S 244-255).

That Appellant's claim of involuntariness was sufficient to require the court to decide that issue was settled in Reddish v. State, 167 So.2d 858 (Fla.1964), in which this Honorable Court recognized that an accused's ability to freely and voluntarily give statements concerning his connection with a crime may be impaired by physical or psychological coercion. In holding that under such circumstances the admission into evidence of the confession was harmful and reversible error, the court stated:

> ". . . It is clear that a conviction which results from either physical or psychological coercion cannot be permitted to stand. Whether the confession is true is not the determining element. It is the method used to obtain the statement that must be measured by constitutional standards. Under our accusatorial system the state cannot establish guilt by statements obtained by either physical or psychological coercion exerted against the accused himself. If for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him." (Emphasis added.) (Id., 167 So.2d at 863.)

In addition, Appellant presented a strong enough showing in support of his contention of involuntariness to require the trial court to

make a specific finding of voluntariness in accordance with McDole v. State, supra, and Sims v. Georgia, supra. Thus, the circumstances Appellant advances for review herein are readily distinguishable from the situation this Court faced in Wilson v. State, (Fla.1974), Case No. 45,690, Opinion filed November 27, 1974.

The admission into evidence of an involuntary confession is a constitutional error of the highest magnitude. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In the instant case, Appellant would submit that a similar fundamental constitutional principle was violated when the trial court admitted Appellant's confession into evidence by simply ruling "Motion to Suppress will be denied." This did not constitute an unequivocal and explicit finding of voluntariness appearing from the record with unmistakable clarity as required by the United States Supreme Court in Sims v. Georgia, supra, and the Florida Supreme Court in McDole v. State, supra. As a result, the trial court committed reversible error in submitting the confession to the jury and a new trial is required. Land v. State, supra; Danahey v. State, supra; Smith v. State, supra.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY AS TO SECOND DEGREE MURDER.

(As raised by Assignment of Error No. 9.)

Appellant was charged by indictment on April 1, 1974, with murder in violation of Florida Statute 782.04 (as amended effective December 11, 1972), which provides:

> "(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user shall be murder in the first degree and shall constitute a capital felony, punishable as provided in Sec. 775.-082.
>
> "(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.
>
> "(2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second de-

> gree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life, or for such term of years as may be determined by the court.
>
> "(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than arson, rape, robbery, burglary, kidnaping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082, section 775.083, or section 775.084."

As quoted above, Fla.Stat. Sec. 782.04(2), F.S.A., provides that murder "committed in the perpetration of or in the attempt to perpetrate" any one of seven specified violent felonies is a murder of the second degree. A murder "committed by a person engaged in the perpetration of or in the attempt to perpetrate" any of the same violent felonies is a murder in the first degree. Fla.Stat. Sec. 782.04(1)(a), F.S.A. (Emphasis supplied.)

In State v. Dixon, 283 So.2d 1, 11 (Fla.1973), this Court rejected the claim that the distinction between the murder one and murder two provisions of the statute was illusory and interchangeable, and stated:

> " . . . We disagree, and hold that the statute does establish two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree.
>
> Under the prior Fla.Stat. Sec.782.04, F.S.A. (amended effective December 8, 1972), the distinction was not present. . . .
>
> The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in

> determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. As to the distinction in any particular case, we need but refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact. Id."

It is a settled principle of law in Florida that in any trial for first degree murder, whether the charge is grounded on specifically alleged premeditated design, or on the basis of a homicide committed (by a person engaged) in the perpetration of certain felonies as proscribed by F.S. 782.04, F.S.A., the defendant is entitled to have the jury advised on all degrees of unlawful homicide, including manslaughter. Brown v. State, 124 So.2d 481 (Fla.1960) (emphasis supplied).

In addition, the determination of the degree of guilt in such cases rests with the jury and not the trial judge. As this Court declared in Hand v. State, 199 So.2d, 100 (Fla.1967):

> "The giving of such instruction (on degrees of unlawful offenses) should not hinge upon whether the trial court believes the evidence is susceptible of inference by the jury that the defendant is guilty of the lesser offense and not of the greater offense. In our opinion such judicial determination at trial level obviously takes a most critical evidentiary matter from the proper province of the jury and vests it improperly as a matter of law with the trial judge. Id. at 101.102

See also Killen v. State, 92 So.2d 825 (Fla.1957).

In a more recent Supreme Court of Florida decision, the rule that

the trial court must instruct the jury on all lesser degrees of an offense which is divided into degrees (such as unlawful homicide under F.S. 782.04) was further imbedded in Florida jurisprudence. In Brown v. State, 206 So.2d 377 (Fla.1968), this court held:

> If an accused is charged with the highest degree of such a crime, the court should charge on all lesser degrees. In this category it is immaterial whether the indictment specifically charges lesser degrees or whether there is any evidence of a crime of such degree (citations omitted). . . . Under the statute (F.S. 919.14 F.S.A.), the trial judge should, and if requested must, instruct on all lesser degrees of the offense, if the case is allowed to go to the jury for a determination of guilt or innocence on the offense charged. (Citation omitted.) (Emphasis supplied.)

The application of the lesser degree offense rule is now controlled by Rule 3.490, F.R.Cr.P. which states:

> "If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

The Fourth District Court of Appeal, in the case of Herman v. State, 275 So.2d 264. (4 DCA 1973); cert. den., 279 So.2d 308 (Fla.1973) dealt with the necessity of jury instructions on lesser degrees of an offense pursuant to Rule 3.490, F.R.Cr.P. In Herman, the Appellant had been charged with second degree murder and, at his trial, the trial judge re-

fused to charge the jury as to the lesser degree of homicide (manslaughter), as required by Rule 3.490, F.R.Cr.P. and a lesser included offense (aggravated assault). The Fourth District Court of Appeals reversed the trial court and held:

> "Based upon the clear language of Rule 3.490, FRCrP, 33 F.S.A. (former Section 919.14, F.S.), the recent decisions interpreting crimes divisible into degrees and necessarilyincluded offenses, and the instant facts, we are of the opinion that the trial court erred in failing to charge on the offenses of manslaughter and aggravated assault. (Citation omitted). The fact that a defendant may assert a claim of self-defense does not mitigate the operation of Rule 3.490 or dispense with the duty of the court to charge the jury on all lesser degrees and necessarily included offenses." (Citation Omitted) Herman, supra, at p. 254-265.

In the case at bar, Appellant repeatedly requested during the jury charge conference that the jury be charged as to the lesser offense of second degree murder according to the murder statute in effect at the time of trial (T 314, 315). The State objected on the grounds that the language of F.S. 782.04(2) was "confusing" and asked that a substituted instruction on second degree murder be given (S 314, 315). The trial court agreed with the State's position and decided to have the instruction on seconddegree murder "read like the old definition of murder in the Second Degree" (S 316). The trial court stated:

> THE COURT: No, I am going to simply make a decision that is in keeping with what has been the Law in the State of Florida for many, many years, and until it was completely

confused by this unintelligible Statute, and that is, I am going on with the State Attorney and changing or when to, and not, and delete the words "as except provided by sub-section one." It is going to read like the old definition of Murder in the Second Degree, which is the only one that anybody can understand, and it is going to make felony murder still Murder One, which seems to be the intent of the legislature since they have it as Murder One. The way it is written now, it is a choice. I don't believe the Jury ought to be given a choice, and still be given the Law (T 316).

In response to this ruling, Appellant's defense counsel objected, stating:

Mr. Carls: Defense would object to that particular instruction (T 316).

After final arguments were completed, and before instructing the jury on the law, the trial court again made known its intention not to instruct the jury, over defense counsel's objection, as to second degree murder as it is set forth under F.S. 782.04(2):

THE COURT: On this instruction, on Second Degree Murder, I am going to delete this portion of the Statute and make the instruction like it should read, to give it to the Jury the way it is in the Statute, it is confusing. I am going to give it to them with the change that we discussed prior to closing argument. It's definitely accurate, so rather than to change the word, I am going to delete it.

MR. CARLS: Once again, for the Record, Defense would take an objection to what we consider to be an improper jury instruction as it does not follow the law as presently constituted (T 354).

During the charge to the jury, the trial court instructed that Appellant was charged with the crime of first degree murder which includes the lesser offense of murder in the second degree (T 355, 359).

In charging on murder in the first degree, the trial court offered various definitions. At page 360 of the trial transcript, the trial court used the wording of the present murder statute, F.S. 782.04(1).

> THE COURT: Murder in the First Degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when uch drug is proven tobe the proximate cause of death of the user (T 360).

At p. 362-3 of the Transcript, the instruction given closely followed the definition of first degree murder under the former murder statute, F.S. 782.-04.

> THE COURT: The killing of a human being in committing, or in attempting to commit any arson, rape, robbery, burglary, kidnapping, aircraft piracy, orthe unlawful throwing, placing, or dischargingof a destructive device or bomb, are Murder in the First Degree even though there is no premeditated design or intent to kill (T 362-363).

At page 363 of the Transcript, the trial court defined first degree murder as such:

> THE COURT: The crime of Murder in the First Degree is defined as follows:
>
> If a person kills another while he is trying to do or commit any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or while escaping from the immediate scene of such crime the killing is

in the perpetration of or in the attempt to perpetrate such arson, rape, robbery, burglarly, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, and is Murder in the First Degree (T 363).

Finally at page 366-367 of the Transcript, the following charge was given:

THE COURT: If the Defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased or in the perpetration of or in an attempt to perpetrate an arson, rape, robbery, burglary, or kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, he should be found guilty of Murder in the First Degree (T 366-367).

With regard to second degree murder, the trial court also gave multiple instructions. At page 364 of the Trial Transcript, it was defined as such:

THE COURT: Murder in the Second Degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life although without a premeditated design to effect the death of any particular individual (T 364).

And at page 367 of the Transcript, the trial court gave an instruction which closely followed the definition of second degree murder under the old murder statute F.S. 782.04.

THE COURT: If the killing was not from a premeditated design to effect the death of any human being . . . state that again . . . if the killing was not from a premeditated design but was in the perpetration of an act imminently dangerous to another evincing a depraved mind regardless of human life, the Defendant should be found guilty of Murder in the Second Degree. Mr.Carls, the changes were in order to remain consistent (T 367).

It is evident that the trial court carried out its intention not to instruct the jury as to the definition of second degree murder under the statute in

effect at the time of trial as requested by Appellant. F.S. 782.04(2). Instead, the trial court instructed the jury with regard to second degree murder under the old, former (since amended) murder statute, which provided in pertinent part:

> When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punished by imprisonment in the state prison for life, or for any number of years not less than twenty years.

Appellant would submit that the trial court committed reversible error in instructing the jury as to second degree murder.

It is well established in Florida that jury instructions must properly state the law to be applied. Kellerman v. State, 261 So.2d 555 (3 DCA 1972). This Court in State v. Dixon, supra, held as unequivocally as possible that the murder statute (under which Appellant was indicted) was the valid, applicable law as far as three degrees of murder were concerned. In addition, Rule 3.490, F.R.Cr.P. and the decisions in the two Brown cases, supra, make it mandatory that the trial court instruct the jury on the lesser degrees of a first degree murder charge. The trial court however blatantly disregarded both of the above commands when it instructed on second degree murder using the old definition of that offense, which is no longer in effect.

It is well recognized that materially erroneous charges will be considered harmful error if the jury was or could have been misled by them. Walsingham v. State, 225 So.2d 857 (Fla.1971); Christian v. State, 272 So.2d 852 (4 DCA 1973).

An examination of the instruction on second degree murder as given

by the trial court shows that this instruction was so erroneous as to preclude the jury from finding the Appellant guilty of any crime but First Degree Murder if they concluded that a homicide had been committed in the course of a robbery or burglary.

Appellant having been convicted of first degree murder and sentenced to death was substantially prejudiced by this error, as no death sentence is permissible upon a conviction for second degree murder. As a result, Appellant's conviction and sentence must be reversed.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING A GRUESOME COLOR PHOTOGRAPH OF THE DECEDENT INTO EVIDENCE
(Raised by Assignment of Error No. 6).

The general rule with reference to color photographs of homicide victims is stated in Nardorff v. State, 196 So. 625 (Fla.1940), at page 626:

> "Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible."

However, in applying the above rule, the Florida Supreme Court has adopted a flexible test which attempts to balance the relevancy of the photograph with the prejudicial effect on the jury. In Leach v. State, 132 So.2d 329 (Fla.1961), the Court stated the test:

> "Where there is an element of relevancy to support admissibility then the trial judge in the first instant and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence." 132 So. at 332 Citations omitted.

Application of the above balancing test presupposes that the photograph(s) were, in the first instance, independently relevant. Dyken v. State, 89 (mg) 967 So.2d 1 (Fla.1956). The test for determining whether or not photographs are relevant was set forth in Reddish v. State, 167 So.2d 858 (Fla. 1964). In Reddish, the Court recognized that relevancy depends on whether or not the photographs tend to prove a fact in issue. "The cause of death had

been clearly established and there was no fact or circumstance in issue which necessitated or justified the introduction of the photographs of the dead bodies." Supra at 863.

This Court has stated however that even in cases where relevancy had been demonstrated, a further test must be met before the inflammatory photographs can be introduced. Speaking to this point, the Florida Supreme Court has ruled that:

> " . . . where admittedly gruesome and reasonably calculated to inflame the minds of the jurors, they (photographs) can only be admissible by a showing of the prosecution that, not only are the pictures relevant, but also that they are demonstrably material in reconciling or tending to reconcile, some disputed fact in evidence directly pertinent to the charge being tried." Albritton v. State, 221 So.2d 192 (Fla.1969).

Just as the cause of death was sufficiently established by independent evidence in Reddish, supra, so too was it independently established in the instant case. The Doctor who testified at trial stated that:

> "I think, first of all, the cause of death and the most obvious area which we first examined the body, was a gag that you can see the residual impression on the tissues of the face and the cheek produced by a gag, that was deep in the corners of the mouth, and we found to be underneath the tongue itself pushing the base of the tongue backward into the throat area and including the airway.
>
> This also included the air passage from the nose down the throat that is, pushed the tongue back and acted the same as if someone had a seizure which obstructs the airway by their tongue.
>
> Q Did he then, in fact, suffocate, Doctor?
>
> A Yes, the cause of death was from

suffocation due to the gag placed deeply into the mouth and pushing the tongue back into the throat (T 218) (emphasis added).

This testimony was not disputed at the trial. It was descriptive and unequivocal; it left no room for doubt as to the cause of death. The other reason for introducing the photograph proffered by the State was that:

> MR. EAGAN: The wounds, Your Honor, might well be relevant in the aspect of robbery, felony murder, he was beaten about the face, and of course we have other evidence that his hands were bound behind him, and I think that shows that he was . . . we are going to show that there were things taken from him, so they were taken by force and violence from his person, which makes a felony murder (T 210).

This too was capable of being explained orally by the Doctor who testified at trial. His detailed testimony (T 217-230) was more than ample to explain the type and extent of the injuries sustained by the decedent. Appellant submits that the photograph introduced by the State at trial

was "admittedly gruesome and reasonably calculated to inflame the minds of the jurors" is beyond dispute.

At trial the State, during the testimony of Dr. Hegert, attempted to introduce a photograph of the deceased at the scene of the crime (T 209). The Judge immediately sent the jury out of the courtroom and asked the Doctor why he needed the photograph (T 209). The Doctor replied that "it shows the gag in the mouth and the deep penetration into the mouth structure of the gag, which is the cause of death. And also shows the area of the incise wounds on the neck of the subject" (T 210). The Court stated that "I could see the relevancy of the gag, the rest of the photograph is a little bit unnerving. Do you have any photographs that you usually take at the hospital which could clearly illustrate this but are not perhaps quite as colorful." (T 210-211) It was then determined that another photograph was in existence, a photograph taken during the autopsy (T 212). This second photograph showed the beating around the face, the bruises and swelling of the head (T 212). It also depicted a crease along the right cheek and it showed the deceased's lips pulled back (T 212). A mark left by the gag was also noticeable in the photograph (T 212). The trial judge acknowledged that the second photograph was "pretty graphic" (T 213). When the judge asked the doctor whether the second photograph was "a little cleaner" than the first (T 212), the doctor replied, "That would be hard to determine, Judge. Body laid on slab, they do usually - - " (T 212). The Court ruled that one of the two photographs would be admitted (T 213). He permitted Defense Counsel to choose which one he preferred without waiving the objection that he

had as to both photographs (T 213). Defense counsel objected to the introduction of the photographs on the grounds that:

> " . . . the pictures are inflammatory and far outweighs the evidentiary . . . the Doctor is well qualified to describe verbally the swelling of the jaw area and also the location in regards to the jaw and I think the Jury is capable; and what little advantage that is added to it is far outweighed by its prejudicial effect on it." (T 211)

After renewing his objection, Defense Counsel chose the second photograph (T 215). Appellant submits that the photograph introduced in the instant case was not independently relevant and even if relevant, it should have been excluded as merely cumulative in accordance with the balancing tests of Leach, supra, and Albritton, supra.

The facts revolving around the introduction of the photographs in the case sub judice are strikingly similar to the facts in Dyken v. State, 89 So.2d 867 (Fla.1956). In Dyken, just as in the instant case, a photograph of the deceased was introduced in a first degree murder prosecution. In Dyken, just as in the case at bar, the photographs depicted the deceased lying on a mortuary slab. Both photographs showed the deceased's wounds in graphic detail. In Dyken, just as in the instant case, the cause of death and location of the wounds were not contested at trial. In both cases the nature and extent of the wounds was independently proved by an abundance of other evidence, and finally, in both cases the jury recommended that the death sentence be imposed. The Court in Dyken reversed the conviction stating that:

> " The State contends that there was no error in the admission of this photograph because it showed the fatal wound of the deceased. Authority is cited in support of this conten-

> tion to the effect that competent and material evidence should not be excluded merely because it may have a tendency to influence and prejudice the jury beyond the strict limits of the purpose for which it is admissible. Lindbery v. State, 134 Fla.786, 184 So. 662; Mardorff v. State, 143 Fla. 64, 196 So.625; 2 Wharton's Criminal Evidence, 11th ed., Sec. 773. This argument, however, presupposes that the photograph was independently relevant. We find that it was not. The location of the wound was freely conceded and abundantly proved by other evidence. The photograph did not include any part of the locus of the crime and was too far in time and space therefrom to have any independent probative value. We agree with appellant that the introduction of this photograph in evidence could have had no purpose or effect other than to inflame the minds of the jurors. We cannot say, in a first degree murder case without recommendation of mercy, that an error of this character and magnitude was not prejudicial. It follows that the judgment appealed from must therefore be, and it is hereby, reversed and the cause remanded for a new trial." Dyken, supra; see also Beagles v. State, 273 So.2d 796 (1 DCA 1973)

Appellant respectfully submits that the photograph should have been excluded as it had no independent relevance to the State's case. Appellant further submits that the photograph, if relevant, was merely cumulative and added nothing to the State's case save for the inflammatory effect that it had upon the jury. Accordingly, Appellant respectfully requests that the Court reverse the conviction and order a new trial.

POINT IV

THE TRIAL COURT COMMITTED HARMFUL AND PREJUDICIAL ERROR IN PERMITTING THE PROSECUTION TO INTRODUCE TESTIMONY AT THE HEARING ON MITIGATION AND AGGRAVATION, WHICH WAS INCOMPETENT AND OUTSIDE THE SCOPE OF SECTION 921.141(5) F.S.A., AS LIMITED BY THE FLORIDA LEGISLATURE.
(Raised by Supplementary Assignment of Error No. 1.)

The Florida legislature, recognizing the unique nature of the death penalty, has provided in Section 921.141 for numerous safeguards before the ultimate sentence may be imposed. These safeguards include: the necessity for separate proceeding on the issue of penalty, Section 921.141(1); an advisory sentence by the jury, based on the mitigating and aggravating circumstances as provided in subsection (6) and (7) (sic) Section 921.141(2); imposition of sentence by the judge including specific written findings of facts based upon the aggravating and mitigating circumstances enumerated in subsection (6) and (7) (sic); automatic review of the judgment and sentence to the Supreme Court of Florida, Section 921.141(4); and finally, the statute provides a list of aggravating and mitigating circumstances which must be taken into account by both the jury and judge before making the decision on life or death. Section 921.141(5),(6). These statutory guidelines were approved of by this Honorable Court in Dixon, supra.

The language of Section 921.141(5) is very clear. No factors in aggravation may be included in the determination of life or death other than those provided for in subsection (5). The statute specifically provides that: (Emphasis added.)

> (5) AGGRAVATING CIRCUMSTANCES. —Aggravating circumstances shall be limited to the following: (Emphasis added.)

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel."

This statutory limitation is supported by other subsections in the Chapter and its strict construction or interpretation is essential if the procedural safeguards as provided for in subsections (1), (2), (3), and (4) are to be given meaning, and, if the legislative intent of the statute is to be preserved.

Subsection (1) provides that the evidence received at the hearing on aggravation and mitigation " . . . shall include matters relating to any of the aggravating and mitigating circumstances enumerated in subsections (6) and (7) (sic) of this Section" (emphasis added).

A further insight into the legislative intent of the statute in regard to what evidence is proper for consideration on the subject of penalty is provided in subsection (2). This subsection which provides

for an advisory sentence by the jury states that " . . . the jury shall deliberate and render an advisory sentence to the Court based upon the following matters:

> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6)(sic); (emphasis added)
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7)(sic), which outweigh the aggravating circumstances found to exist; and (emphasis added).
>
> (c) Based on these considerations, whether the defendant should be sentenced to life (imprisonment) or death." (emphasis added.)

It is clear that from a reading of this subsection that the legislature was desirous of limiting the evidence to be weighed by the jury to those matters specifically set forth in subsections (5) and (6).

Finally, subsection (3) settles conclusively the question of what circumstances are proper for inclusion in the determination of whether a sentence of death or life imprisonment is to be imposed.

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (6), (sic) and
>
> (b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), (sic) to outweigh the aggravated circumstances.

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) (sic) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with Sec. 775.082.

The legislature has provided these strict guidelines in an attempt to conform to the constitutional mandates of Furman v. Georgia, 408 U.S. 238 (1972), limiting arbitrariness and abuse of discretion in the sentencing procedure involving a decision of such magnitude - - a decision of life or death. Were the legislature not intent on establishing such strict guidelines concerning the factors to be taken into account when determining the sentence in a capital case, it easily could have replaced the mandatory language of Section 921.141(5) and the other sections included within the Chapter with discretionary language or with no guidelines at all.

Thus, it is clear that the Florida legislature intended that only certain factors, factors specifically set forth in Section 921.141 (5) be considered in determing whether a defendant convicted of a capital offense shall be sentenced to death or life imprisonment.

At the hearing on mitigation and aggravation in the instant case, the State called Ronald Eugene Ferguson, an Orlando police officer, to the stand (T 386). Officer Ferguson was asked by the prosecutor whether he had arrested Mr. Henry, the Appellant, on March 28, 1974 (four days after the alleged murder) for the murder of which he had just been convicted (T 387). Officer Ferguson testified that he had (T 387). The following exchange then occurred:

> THE PROSECUTOR: Did the Defendant resist you in that arrest.

Defense Attorney: Your Honor, at this point I will object. I am looking down the category of items to be considered in aggravation, and fail to see where this arrest, three days after the incident, fits into any of them, unless it is the Court's intention to allow generally charged evidence (T 387-388). (Emphasis added.)

THE COURT: It is

Defense Attorney: Then I will object to the introduction of particular, of that general charge reference.

THE COURT: I also feel that it is relevant. All right (T 388).

Over defense objection the prosecutor was then permitted to elicit in detail from Officer Ferguson the circumstances of his attempted arrest of Mr. Henry. This testimony is included in total as a reading of it clearly demonstrates its extremely prejudicial effect on both the judge and the jury.

Q In the course of that resistance, did he take in his hands your weapon?

A Yes, sir.

Q Was that a .38 caliber revolver?

A Yes, sir.

Q From the point that the Defendant had your revolver in his hands, relate to the Jury what occurred?

A After Mr. Henry took my gun, he was outside the car, and he directed me to drive him. He did this by pointing the gun at me and to the car and saying, "Let's go." At this point, I ran south . . . correction . . . west, around the back of the car, south to a fence. I jumped the fence, and was shot at once.

Q Were you hit?

A No, sir.

Q What happened then?

A I crossed the fence and took three or four steps, and was shot in the back and —

Q All right. Did you fall?

A No, sir, not then.

Q Did you continue to run?

A Yes, sir.

Q Did Mr. Henry pursue you?

A Yes, sir, he did.

Q What occurred next?

A I got out into the street, Sunset Drive, and looked back, and Henry shot again chasing me.

Q Did he hit you that time?

A No, sir.

Q Did you continue to run?

A Yes, sir.

Q Did he continue to pursue you?

A Yes, sir.

Q. (Whereupon at this point the witness began to lose his composure) All right. Regain your composure. Tell me what happened next?

A Mr. Henry caught up with me and struck me with the gun in the head, forehead, right here (witness indicating). At this point, the gun went off and knocked me to the ground.

Q Did you say anything to him?

A Yes, sir, at this point I said, please don't shoot me any more.

Q What did he do?

A He raised the gun as if to take aim.

Q Did he fire it?

A Yes, sir.

Q Did he hit you?

A Yes, sir.

Q Where did the bullet strike you that time?

A On the right collarbone.

MR. EAGAN: You may inquire (388-390).

The emotional impact of the above testimony on the jury and on the trial judge must have been devastating. The police officer reciting those events and actually losing his composure unquestionably struck hard at the human emotions of the judge and jury.

Appellant strongly submits that this testimony should have been excluded as incompetent in that it was introduced solely to inflame the minds of the judge and jurors, and was not a proper aggravating circumstances as enumerated in Section 921.141(5), F.S.A., and was an improper matter for consideration by the jury as provided for in Section 921.141(2), F.S.A., or the judge as provided for in Section 921.141(3), F.S.A.

Evidence of an act of violence committed subsequent to the capital offense for which Appellant stood convicted was irrelevant as to whether of not the capital felony was committed while the Appellant was under a sentence of imprisonment as provided for in subsection (5)(a). It was likewise irrelevant to indicate whether or not Appellant was previously convicted of violent felony as provided for in subsection (5)(b). The testimony could shed no light on whether at the time of the capital felony the Appellant knowingly created a great risk of death to

many persons, subsection (5)(c), nor was the evidence relevant to determine if the capital felony was committed while the Appellant was involved in one of the enumerated felonies set forth in subsection (5)(d), or that it was committed for pecuniary gain, subsection (5)(f). The testimony did not answer the question of whether the capital felony was committed for the purpose of preventing a lawful arrest or effecting an escape from custody, subsection (5)(e), and it certainly did not tend to prove whether or not the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws as set forth in subsection (5)(g). Finally, the testimony of Officer Ferguson did not indicate whether or not the capital felony was especially heinous or cruel, subsection (5)(h). That Officer Ferguson's testimony was considered by the judge and jury in their respective deliberations is beyond dispute. The trial judge in his Findings in Support of Verdict stated:

> " . . . and having also demonstrated his viciousness and callous indifference to human life when he assaulted Officer Ferguson with the Officer's own pistol at the time of his arrest for the charges in this case, at which time he shot the police officer three times, the last time while the Officer was on his knees begging not to be shot any more . . . ." (R 101).

The testimony was of such an inflammatory nature that it would be impossible to assume that the jury did not consider it, especially since it was introduced at a hearing in Mitigation and Aggravation by the State and very little other evidence in aggravation was presented. In addition, the prosecutor, during his closing statement at the hearing in aggravation and mitigation, spent a substantial portion of his argument going over the prejudicial testimony. In fact, the State used the

questioned testimony to argue to the jury that Mr. Henry was depraved and did not deserve to live (T 402-403). Appellant submits that the testimony of Officer Ferguson was incompetent as it fell well beyond the rigid parameters of aggravating circumstances established by the Florida legislature in Section 921.141, F.S.A. Appellant further submits that the testimony was highly emotional and extremely prejudicial to him.

Accordingly, on the basis of the point above, Appellant respectfully requests that this Court vacate the sentence of death imposed upon him and enter a sentence of life imprisonment.

POINT V

THE LOWER COURT ERRED IN SENTENCING THE APPELLANT TO DEATH

(Raised by Supplemental Assignment of Error No. 1).

Appellant would submit that even if the court determines that Appellant's conviction should not be reversed, and that the death sentence should not be set aside based on Point IV of his Brief, the trial court erred in pronouncing the sentence of death in the instant case.

In its decision in State v. Dixon, (Fla.1973) 293 So.2d 1, this Court gave a rather succinct summary of the nature of the death penalty:

> Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes . . . Dixon, supra, at 7.

It is because of the uniqueness and finality of the death penalty that the legislature has set forth a system of checks to be utilized in determining the applicability of the death sentence:

> It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty — each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient, Dixon, supra, at 8.

Appellant would submit that in the instant case, a punishment of life imprisonment would be sufficient, and, more importantly, the legislative guidelines dealing with both aggravating and mitigating circumstances surrounding the crime committed by the Appellant would militate against the imposition of death.

As discussed in Point IV infra, the Florida legislature has laid down specific aggravating and mitigating circumstances which are proper for consideration by the judge and jury in determining whether a sentence of death or life imprisonment is appropriate. Section 921.141(5) and (6) provides:

> (5) AGGRAVATING CIRCUMSTANCES. —Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
> (c) The defendant knowingly created a great risk of death to many persons.
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> (f) The capital felony was committed for pecuniary gain.
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> (h) The capital felony was especially heinous, atrocious, or cruel.
> (6) MITIGATING CIRCUMSTANCES. — Mitigating circumstances shall be the following:
> (a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relative minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

Excluding the incompetent evidence discussed in Point IV infra, the only evidence presented by the State in Aggravation was that Appellant had previously been convicted of aggravated assault and aggravated battery (T 391-392).

In Mitigation, the Appellant presented witnesses who testified that they had never seen him commit any acts of violence (393, 398), and that he was constantly giving of himself and helping others. This included babysitting for children of friends (T 394, 397), and lending money to those in need (393, 395, 397).

After the jury had been deliberating the sentence for fifty (50) minutes, they sent a note to the judge asking: "Is there any way of a prisoner getting out of prison in less than 25 years, some way other than parole when sentenced to life imprisonment?" (T 414.) To this question the judge re-instructed the jury on the penalties for a capital felony (T 414). He did not answer their question. The jury went back to deliberate and returned an advisory sentence of death 10 minutes later (T 415). The vote was 7 to 5 for the death sentence.

Without a recess, the judge indicated that he had already reached the same conclusion as the jury (T 415). Before pronouncing sentence, the judge stated that the aggravating factors which he found to be present were:

1) That Mr. Henry had previously been convicted of a violent felony Sec. 921.141(5)(b)

2) That the capital felony was committed during a robbery Sec. 921.141(5)(d).

3) That the robbery was committed for pecuniary gain Sec. 921.141(5)(f).

4) That the capital felony was especially heinous Sec. 921.141(5)(g).

The court stated that it could find no mitigating circumstances.

The court then sentenced Appellant to death (T 423).

It was clear from the judge's findings in mitigation and aggravation that he had been tremendously influenced by the testimony about Appellant's attempted escape four days after the alleged murder (see Point IV infra). The judge referred to it twice before pronouncing sentence (T 417, 419).

As discussed above, the trial judge immediately imposed the death sentence after the jury's recommendation. This immediate imposition of sentence is contrary to the legislative intent of the statute. In Taylor v. State, 294 So.2d 648 (Fla.1974) this court discussed precisely that question. In Taylor, the trial judge immediately pronounced sentence after hearing the jury's recommendation. The Taylor court stated that the "immediate rejection of the jury's recommendation upon its return to the courtroom does not comport with the intent of the legislation" 294 So.2d 651. The court went on to explain that:

> "From our reading of the record it appears that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute . . ."

Appellant submits that so crucial a decision as whether or not to sentence a person to death should not be made without reflection. The judge in the instant case had his mind made up before the advisory jury returned with its verdict and did not comport with the spirit of Section 921.141 F.S.A.

Accordingly, Appellant's sentence should be reduced to life imprisonment.

POINT VI

SECTION 921.141, FLORIDA STATUTES, WHICH AUTHORIZES THE DEATH PENALTY, IS UNCONSTITUTIONAL PER SE SINCE IT IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE HOLDING OF FURMAN V. GEORGIA, 408 U.S. 238 (1972).

(Raised by Supplemental Assignment of Error No. 2.)

The Appellant recognizes that this court passed upon the constitutionality of Florida's death penalty in State v. Dixon, 383 So.2d 1 (Fla.1973), and found it to be " . . . constitutional as measured by the controlling law of this state and under the constitutional test set forth by Furman v. Georgia, 408 U.S. 238, (1972)."
However, Appellant respectfully requests that this Court re-examine that opinion in light of the capital sentences which have been rendered subsequent to the filing of the Dixon opinion. This Court may take judicial notice of the record of the proceedings in companion cases. See Stark v. Frayer, 67 So.2d 237, 239 (Fla.1953).

The result of the United States Supreme Court's decision in Furman was to render unconstitutional every death sentence imposed pursuant to a statutory scheme which allows arbitrary selective processes to determine whether or not a defendant found guilty of a capital crime will receive a death sentence. This is clear from the separate opinions of the majority Justices. Although these five opinions differ in scope, all of them plainly, incontrovertibly, and unmistakably agree that selectively imposed death penalties are unconstitutional. 1/

This Court, in its decision in Dixon, recognized that there is a possibility of an abuse of discretion and the possibility of selectively

imposed death penalties. This Court, in its decision, stated that it is possible for a jury to have "inflamed emotions" and thus abuse its discretion under the sentencing provisions. Dixon, supra at 8. Thus, the trial court is given the power to determine final sentence:

> The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed—guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience. Dixon, supra at 8.

1/ Mr. Justice Brennan (408 U.S. at 257-308) and Mr. Justice Marshall (408 U.S. at 314-374) shared the view that the death penalty is unconstitutional per se regardless of the presence or absence of discretion in the procedural system whereby it is applied. The broad scope of the majority's decision in Furman is also clear from the Court's unanimous application of Furman (per Blackmun J.) in Moore v. Illinois, 408 U.S. 786 (1972), and by the Court's June 29, 1972 order list, which summarily vacated death sentences in some 120 other capital cases involving innumerable statutes from 26 states. See Stewart v. Massachusetts and companion cases 408 U.S. 744-766 (1972). The Court has continued to vacate any death sentences imposed under nonmandatory procedures. See, Jackson v. Georgia, 409 U.S. 1122 (1973).

As this Court implied in its Dixon decision, there is a possibility that the trial court might abuse its discretion in sentencing, and for this reason, the Supreme Court is given the power of final review. To make this review by this Court more exacting, the statutes require that the trial court justify its sentence of death in writing. Fla.Stat. 921.141:

> The fourth step required by Fla. Stat. Sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.
>
> Review of a sentence of death by this Court, provided by Fla. Stat. Sec. 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution. Dixon, supra at 8.

An examination of the records of the 33 capital cases that have reached death row in Florida State Prisons since the Furman decision reveals that in 14 of them the trial judge refused to follow the jury's recommendation of life and sentenced the defendant to death.

Thus, it is clear that the new Florida death penalty statute suffers from the same vice for which the old statute was declared unconstitutional, to-wit: the statute establishes a statutory scheme which allows arbitrary selective processes to determine whether or not a defendant found guilty of a capital crime will receive a death sentence. Furman, supra, and the 9 companion cases wherein the old Florida death penalty was stricken. 2/

The addition of aggravating and mitigating circumstances in the new statute fails to cure the statute of its constitutional infirmities. These guidelines are more illusory than substantive since they fail to channel judicial discretion within the constitutionally permissible bounds established by Furman. This failure is demonstrated by the above cited cases wherein the trial judge acted out the death penalty in spite of the jury's recommendation of life.

Appellant submits that the five steps between conviction and imposition of the death penalty, which this Court in Dixon characterized as concrete safeguards beyond those of the trial system to protect a defendant from death where a less harsh punishment might be sufficient, only operate to provide additional opportunity for the exercise of unbridled discretion.

2/ Anderson v. Florida, 408 U.S. 928 (1972); Pitts v. Wainwright, 408 U.S. 941 (1972); [illegible] v. Florida, 408 U.S. 940 (1972); [illegible] v. Florida, 408 U.S. 941 (1972); [illegible] v. Wainwright, 408 U.S. 941 (1972); [illegible] v. Florida, 408 U.S. 939 (1972); [illegible] v. Florida, 408 U.S. 939 (1972); [illegible] v. Florida, 408 U.S. 935 (1972); Williams v. Wainwright, 408 U.S. 941 (1972).

In summary, the statutes under which the Appellant was sentenced to death allow the exercise of discretion by both the jury and the trial court. The jury may exercise discretion in its decision whether or not to recommend the death penalty. This decision of the jury is then to be reviewed by the trial court to decide whether or not the jury abused their discretion. Finally, the trial court's decision is to be reviewed by the Florida Supreme Court with the purpose of this review being the prevention of abuse of discretion by the trial judge in sentencing. Dixon, supra, at 8. Although there is review provided by the statutes, as recognized by this Court in Dixon, there is also an opportunity for the use, and abuse, of discretion. For the foregoing reasons, the Appellant would submit that the statutes thereby violate the constitutional guidelines in Furman.

Accordingly, Appellant respectfully requests that on the basis of the above argument, his sentence should be reduced to life imprisonment.

CONCLUSION

For the reasons and arguments set forth in Points on Appeal I, II, and III, Appellant respectfully requests that this Honorable Court reverse his conviction of First Degree Murder and Sentence of Death.

For the reasons and arguments set forth in Points on Appeal IV, V, and VI, Appellant respectfully requests that this Honorable Court vacate his sentence of death.

Respectfully submitted,

/s/ Martin H. Colin
MARTIN H. COLIN
Assistant Public Defender
15th Judicial Circuit of Florida

/s/ Richard Lubin
RICHARD LUBIN
Assistant Public Defender
15th Judicial Circuit of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to the ATTORNEY GENERAL, Tallahassee, Florida, this 2nd day of January, 1975.

/s/ Martin H. Colin
Counsel.

/s/ Richard Lubin
Counsel.